

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

WARREN GRUBE)	
Claimant)	
VS.)	
)	Docket Nos. 180,771 & 198,771
UNITED PARCEL SERVICE)	
Respondent)	
AND)	
)	
LIBERTY MUTUAL INSURANCE COMPANY)	
Insurance Carrier)	
AND)	
)	
WORKERS COMPENSATION FUND)	

ORDER

Claimant requested review of the Award dated November 12, 1996, entered by Administrative Law Judge John D. Clark. The Appeals Board heard oral argument on April 15, 1997.

APPEARANCES

Keith L. Mark of Mission, Kansas, appeared for the claimant. Frederick J. Greenbaum of Kansas City, Kansas, appeared for the respondent and its insurance carrier. Frank A. Caro, Jr., of Kansas City, Missouri, appeared for the Workers Compensation Fund.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award. In addition, at oral argument the parties stipulated the medical report dated October 12, 1995, prepared by Robert A. Rawcliffe, Jr., M.D., should be considered as part of the evidentiary record. Also, respondent's counsel notified the Appeals Board after oral argument that the Fund liability issue had been resolved.

ISSUES

For an October 14, 1992, back injury, the Administrative Law Judge awarded claimant permanent partial general disability benefits based upon an 8 percent whole body functional impairment. For an October 21, 1994, accident, the Administrative Law Judge found it produced a temporary aggravation only and denied claimant's request for permanent partial disability benefits. The Administrative Law Judge also determined the Workers Compensation Fund had no liability in this proceeding.

The issues now before the Appeals Board are (1) nature and extent of claimant's injury and disability and (2) average weekly wage.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The Award should be modified to award claimant permanent partial general disability benefits for a 9 percent whole body functional impairment for the October 14, 1992, accident. The Administrative Law Judge's finding that claimant did not sustain permanent injury as a result of the October 21, 1994, accident should be affirmed.

(1) The Appeals Board finds claimant sustained permanent injury to his back as the result of an October 14, 1992, work-related accident. Because his is an "unscheduled" injury, claimant's entitlement to permanent partial general disability benefits is governed by K.S.A. 1992 Supp. 44-510e. Because claimant has returned to work for the respondent at a comparable wage, there is no claim at this time for work disability. Therefore, claimant's permanent partial disability benefits are to be based upon his functional impairment rating.

Several doctors provided their opinions of the permanent functional impairment claimant sustained as a result of the October 1992 accident. However, the Appeals Board finds the opinion of Dale E. Darnell, M.D., the most persuasive because he was the only physician, among those who provided their opinion, who saw claimant both before and after his second accident on October 21, 1994. Therefore, Dr. Darnell was in the best position to determine the permanent injury caused by the October 1992 accident as

opposed to the injury caused by the October 1994 accident. Based upon Dr. Darnell's testimony, the Appeals Board finds claimant has sustained a 9 percent whole body functional impairment for which he should receive permanent partial general disability benefits.

The Appeals Board also finds the greater weight of the medical evidence indicates claimant did not sustain either permanent injury or permanent functional impairment as a result of the second accident on October 21, 1994. That conclusion is also based upon Dr. Darnell's medical opinion as well as that of Robert A. Rawcliffe, Jr., M.D., and Ely Bartal, M.D.

(2) The Appeals Board finds claimant's average weekly wage on the date of the October 1992 accident was \$834.81. The Appeals Board finds claimant's base wage was \$708 per week which is based upon a \$17.70 hourly rate and a 40-hour work week. The Appeals Board also finds claimant's average weekly overtime was \$126.81 which is determined by adding claimant's overtime during the 26-week period before the October 1992 accident and dividing that total by the 19 weeks claimant actually worked during that period. The overtime indicated on claimant's Exhibit 1 introduced at the Regular Hearing totals \$2,409.33. Such computation conforms with K.S.A. 1992 Supp. 44-511(b)(4) and Elder v. Arma Mobile Transit Co., 253 Kan. 824, 861 P.2d 822 (1993).

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award dated November 12, 1996, entered by Administrative Law Judge John D. Clark should be, and hereby is, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Warren Grube, and against the respondent, United Parcel Service, and its insurance carrier, Liberty Mutual Insurance Company, for an accidental injury which occurred October 14, 1992, and based upon an average weekly wage of \$834.81 for 73 weeks of temporary total disability compensation at the rate of \$299 per week or \$21,827, followed by 342 weeks at the rate of \$50.09 per week or \$17,130.78, for a 9% permanent partial general disability based on functional impairment, making a total award of \$38,957.78.

As of April 30, 1997, there is due and owing claimant 73 weeks of temporary total disability compensation at the rate of \$299 per week or \$21,827, followed by 164 weeks of permanent partial disability compensation at the rate of \$50.09 per week in the sum of \$8,214.76 for a total of \$30,041.76, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$8,916.02 is to be paid for 178 weeks at the rate of \$50.09 per week, until fully paid or further order of the Director.

Claimant's request for permanent partial disability benefits arising from the October 21, 1994, accident should be, and hereby is, denied.

Claimant may request additional medical benefits upon proper application to the Director.

The remaining orders entered by the Administrative Law Judge are hereby adopted by the Appeals Board as its own to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of May 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Keith L. Mark, Mission, KS
Frederick J. Greenbaum, Kansas City, KS
Frank A. Caro, Jr., Kansas City, MO
John D. Clark, Administrative Law Judge
Philip S. Harness, Director